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No. 91-155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,

Petitioners,

vs.

WALTER LEE, Superintendent of Port Authority Police,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Port Authority of New York and New Jersey, the agency that operates the three major New York Metropolitan area airports, restricts the repetitive distribution of literature and solicitation of contributions to the exterior portions of the airports' terminal buildings. The restriction is imposed as a means of promoting the safe and convenient use of those buildings by air travelers and other visitors. In a suit brought by the International Society for Krishna Consciousness, Inc. ("ISKCON"), and a member thereof, the United States District Court for the Southern District of New York held that the airport terminals were public fora, and granted ISKCON summary judgment declaring the restrictions to be in violation of the First Amendment. In a partial reversal of the District Court judgment, the United States Court of Appeals for the Second Circuit held that the airport terminals were not public fora, and reversed the portion of the judgment below declaring the restriction on solicitation to the exterior of those buildings to be unconstitutional. The Court of Appeals, however, did not disturb the District Court's judgment invalidating the restriction on the distribution of literature, although neither court held that the restriction was not a reasonable means of serving the legitimate interests of the Port Authority as operator of the airport.

ISKCON has filed a Petition for a Writ of Certiorari with respect to the Second Circuit's reversal of the District Court judgment declaring the restriction on solicitation to be unconstitutional. The respondent to ISKCON's petition did not file a response to the petition identified as such, but filed a Cross-Petition for a Writ of Certiorari with respect to the Second Circuit's affirmance of the District Court judgment invalidating the restriction on the distribution of literature. The Cross-Petition has been assigned Docket Number 91-339.

This Court has since requested that the respondent file the within formal response to the petition.

The Petition for a Writ of Certiorari presents the following questions:

1. Are the interiors of airport terminals, which have as their sole purpose the facilitation of air travel, public fora because of the presence of support services for air travelers and large numbers of visitors in the terminals?

2. Is a restriction on the repetitive solicitation of money to the exterior portions of an airport terminal building, which serves thousands of airline passengers and other air travel-related visitors each day, a reasonable means of serving the airport operator's interest in promoting the safe and convenient use of the airport by air travelers?

LIST OF PARTIES

Respondent Walter Lee was Superintendent of the Port Authority Police when this action was commenced. The Superintendent of Port Authority Police is an employee of The Port Authority of New York and New Jersey ("the Port Authority"). The Port Authority is a bi-State agency created in 1921 by a Congressionally-consented-to Compact to develop interstate public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney 1979); N.J. Stat. Ann. §§32:1-1 to -24 (West 1963). Pursuant to the Compact, and subsequently enacted bi-State legislation supplemental thereto, the Port Authority owns and operates thirty-seven public facilities in the Port District including the three major New York metropolitan area airports — John F. Kennedy International Airport, LaGuardia Airport and Newark International Airport. The Port Authority has no subsidiaries other than the Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary which owns and operates the PATH railroad line between New York and New Jersey, and the Newark Legal and Communications Center Urban Renewal Corporation, which owns and operates an office building in Newark, New Jersey.

Petitioner International Society for Krishna Consciousness, Inc. ("ISKCON") is organized as a not-for-profit religious organization. Petitioner Brian Rumbaugh is a member of ISKCON.

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix to Petition for Writ of Certiorari, at 1-28) is reported at 925 F.2d 576 (2d Cir. 1991). The opinion of the District Court (Appendix to Petition for Writ of Certiorari, at 30-48) is reported at 721 F. Supp. 572 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1991. A Petition for Rehearing with Suggestion for Rehearing En Banc was timely filed, and was denied on April 25, 1991. The Petition for a Writ of Certiorari was received on July 26, 1991. The respondent did not file a formal response to the Petition for a Writ of Certiorari identified as such, but filed a Cross-Petition for a Writ of Certiorari. The Cross-Petition was filed on August 26, 1991, and was assigned Docket Number 91-339. By letter dated September 9, 1991, this Court requested that a formal response to the Petition for a Writ of Certiorari be filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. amends. I and XIV.

Airport Rules and Regulations, The Port Authority of New York and New Jersey, Chapter III, Part B, as amended by resolution dated February 11, 1988, provides in pertinent part as follows:

> "B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

> . . .
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.
>
> . . . "

STATEMENT OF THE CASE[1]

(A)

Petitioners, plaintiffs below, are the International Society for Krishna Consciousness, Inc. ("ISKCON") and a member thereof.[2] ISKCON members perform a practice known as *sankirtan*, which consists of " 'going into public places, disseminating religious literature and soliciting funds to support the religion.' " (A 3, 31).[3] The primary purpose of the activity appears to be fundraising (A 3). Plaintiffs instituted the suit at bar to challenge regulations whose effect was to restrict the practice of *sankirtan* at the three major airports serving the New York City metropolitan area, John F. Kennedy International Airport ("Kennedy"), LaGuardia Airport ("LaGuardia") and Newark International Airport ("Newark") (A 2, 30).

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[1] The Statement of the Case in the Cross-Petition for Certiorari is reproduced here for the convenience of the Court.

[2] Hereinafter, the Petitioners will be referred to as "Plaintiffs".

[3] "A" followed by numerals refers to pages of the Appendix to the Petition for a Writ of Certiorari ("Petition").

Respondent Walter Lee was Superintendent of the Port Authority Police when this suit began.[4] The Superintendent is an employee of The Port Authority of New York and New Jersey in command of the police force of the Port Authority. The Port Authority was created in 1921 by a congressionally-consented-to interstate compact between the States of New York and New Jersey to develop public transportation, terminal and other facilities of commerce (A 4, 30).[5] At the present time, the Port Authority owns and/or operates thirty-seven (37) such facilities, including John F. Kennedy International Airport ("Kennedy"), LaGuardia Airport ("LaGuardia") and Newark International Airport ("Newark"). These three airports constitute the busiest and most heavily used airport complex in the world. In 1986, they served approximately 79 million travelers, constituting about eight percent of United States' domestic flights, and over one-half of United States' trans-Atlantic flights. It is estimated that the passenger load of the airports will increase to 110 million by the year 2000 (A 4).

The Port Authority is charged with operating the three airports for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Laws §6634 (McKinney 1979); N.J. Stat. Ann. §32:1-35.4 (West 1963). In accordance with its statutory authority, the Port Authority has leased much of the space in the airports to numerous airlines. Under these leases, the airlines exercise primary control over the leased areas (A 4). The Port Authority retains complete

[4] Walter Lee no longer holds this position. The caption has not been amended to substitute another named defendant. *See*, Petition at 3 n.3.

Hereinafter, the Respondent will be referred to as "Superintendent".

[5] The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney 1979); N.J. Stat. Ann. §§32:1-1 to -24 (West 1963).

control over unleased areas. This action originally concerned restrictions in all areas of the airport, both leased and unleased. However, over the course of the litigation, Plaintiffs' claims with respect to leased areas were settled,[6] and only the claims with respect to the unleased areas of the Airports within Port Authority control remained for determination by the District Court (A 4, 32).[7]

The Port Authority airports' sole purpose is to facilitate air travel (A 12-13, 43, 44). This purpose is reflected in a variety of airport characteristics: user-fee financing, pedestrian congestion, the existence of captive audiences, physical separation from surrounding communities and special security concerns (A 12-14, 44-47). The air terminals contain facilities which directly and indirectly serve air travelers. The facilities which indirectly serve air travelers are restaurants, snack stands, postal facilities, currency exchange facilities, bookstores and similar facilities (A 5, 40). Although access to these facilities is not restricted, virtually all persons who visit the airports do so for air-travel-related purposes, *i.e.*, for air travel itself, to meet an air traveler or to perform a service for an airline or airport terminal service provider (A 5, 12-13).

[6] The settlement agreement between the Plaintiffs and the airlines provided, *inter alia*, that Plaintiffs would release the airlines from any claim at law or equity arising from the airlines' refusal to allow Plaintiffs to distribute literature or solicit contributions in airline terminal space, and that Plaintiffs would enjoy the same access to such space that an unrelated party would be granted by reason of a final judgment in subsequent litigation against the airlines (Joint Appendix, at 319, 320).

[7] Hereinafter, for the sake of brevity, the phrase "air terminals" will refer only to Port Authority controlled areas, the subject of Plaintiffs' remaining claims.

The Port Authority has adopted regulations to address the adverse effects of leafleting and solicitation upon the safe, efficient and convenient use of the airports by airline passengers. Pedestrian congestion presents a particularly acute problem at the Port Authority airport terminals. Much of these facilities were built before the introduction of wide-body, high passenger load aircraft; and air travelers, who are often burdened with baggage, and may be hurrying to a plane or ground transportation, are more adversely affected by congestion than pedestrians in other contexts (A 14).

Certain of the Port Authority regulations effectively prohibit the performance of *sankirtan* in the interior portions of the air terminals. These regulations provide in pertinent part as follows:

> "[B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:]
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> . . .
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds."[8] (A 6).

[8] Airport Rules and Regulations, The Port Authority of New York and New Jersey, Chapter III, Part B, Section 1, as amended by resolution dated February 11, 1988.

(B)

After preliminary proceedings described in the opinions below, the District Court granted Plaintiffs summary judgment, holding that the Port Authority's regulations prohibiting the continuous and repetitive distribution of literature and solicitation of contributions inside the air terminals violated the United States Constitution based in principal part upon the District Court's determination that the air terminals are public fora (A 47-48).

The District Court determined the standard to be applied to the Port Authority's regulations using this Court's now familiar public forum analysis of *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985):

> "[Under public forum analysis, i]n both traditional and designated public fora, the government may not impose content-based restrictions on First Amendment activity unless those restrictions are narrowly tailored to further a compelling state interest. However, the government may impose in those fora content-neutral time, place and manner restrictions, provided such restrictions serve significant governmental interests and leave adequate alternative channels of communication open. In a non-public forum, by contrast, the government may restrict expression, so long as the restrictions are reasonable and do not discriminate against certain viewpoints." (A38 (citations omitted)).

The District Court noted that "[i]t is now well settled that streets, parks and sidewalks are traditional public fora[,]" (A 38) and, that designated public fora are places "which

the 'State has [intentionally] opened for use by the public as a place for expressive activity.'" (A 38 (brackets in original)).

The District Court held that the air terminals were traditional public fora because they possessed the characteristics of a "bustling metropolitan boulevard" (A 40). The court rejected the Superintendent's contention that public streets and parks are unique species of public property and that airports should not be classified with them as traditional public fora (A 41). The court also rejected the Superintendent's argument that the sole purpose of the air terminals as facilitators of air transportation and the attendant characteristics of airport terminals, including their design, financing, planning, conditions of congestion, presence of captive audiences, isolation from surrounding communities and security problems, distinguish airport terminals from city streets. According to the District Court, these characteristics do not take airports out of the traditional public forum classification, and, to the extent that First Amendment activity would interfere with airport operations, such issues should be addressed in time, place and manner restrictions (A 43-47). Accordingly, the District Court granted Plaintiffs' motion for summary judgment (A 48). The Superintendent appealed to the Second Circuit.

(C)

The Court of Appeals reversed the judgment below in part, holding that the Port Authority rules at issue were valid insofar as they prohibited solicitation within the air terminals, but were invalid insofar as they prohibited the distribution of literature within the air terminals. The Court of Appeals' decision was based in large part upon this Court's decision in *United States v. Kokinda*, ____ U.S. ____, 110 S.Ct. 3115 (1990), which was issued after the case at bar was heard in oral argument. *Kokinda* held that the Postal Service's prohibition of the solicitation of funds on a walkway outside of a post office was valid.

After reviewing the facts of this case and the public forum doctrine in general (A 1-6), the Court of Appeals began its discussion of the case at bar by considering whether the airport terminals were public fora. The Second Circuit stated that prior to the decision in *Kokinda*, it would have classified the air terminals as public fora because the established authority in other circuits had classified airports as pubic fora, and the court was reluctant to create a conflict when the view of other circuit courts was not unreasonable. However, the court below continued, "*Kokinda*[ ] has altered public forum analysis and . . . we would not be faithful to Supreme Court precedent if we were to follow the other circuits." (A 10-11).

Under the Second Circuit's analysis, *Kokinda* upheld the prohibition of solicitation on the post office walkway based upon two parallel rationales. First, in the plurality opinion written by Justice O'Connor,[9] the prohibition was valid because the walkway was not a public forum since it "was not a public passageway designed 'to facilitate the daily commerce and life of the neighborhood or city' but was intended 'solely to assist postal patrons' to get access to postal services. [110 S.Ct.] at 3123." (A 11). And, second, in the concurring opinion of Justice Kennedy, solicitation was sufficiently disruptive conduct so that it could be prohibited irrespective of whether the walkway was a public forum (A 12).

According to the Court of Appeals, the passageways in the Port Authority's terminals are similar to the walkway in *Kokinda* because both the airport terminals and the post

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[9] The plurality opinion written by Justice O'Connor was joined in by the Chief Justice and Justices White and Scalia. *United States v. Kokinda*, ____ U.S. ____, 110 S.Ct. 3117 (1990).

office walkway are intended solely to facilitate a particular class of transactions — air travel in the case of the airport terminal passageways, postal activities in the case of the post office walkways. People do not use the passageways in air terminals to meet friends for lunch, window-shop, take the air, or engage in any of the other purposes for which city streets are used. The passageways are used solely for air-related purposes by travelers, persons connected with air travelers, or employees of businesses serving air travelers (A 12, 13). The similar appearances of the airport passageways and city streets were held to be of no moment in view of the special purpose of the airport (A 13).

Furthermore, the majority stated, the Port Authority's anti-solicitation restriction served precisely the same purpose as the restriction upheld in *Kokinda*. Like the Postal Service in *Kokinda*, the Port Authority has an interest in protecting its airport patrons from the disruption of in-person solicitation (A 13-14). In fact, the Court of Appeals held that solicitation would have a greater disruptive effect in the air terminal than in a post office walkway because of the nature of the air terminals. Specifically, the Second Circuit held that pedestrian congestion is one of the greatest problems of the air terminals because much of the facilities in question were built before wide-body aircraft, and air travelers are often weighted down by cumbersome baggage while hurrying to catch a plane or to arrange ground transportation (A 14).

Although the Court of Appeals upheld the validity of the ban on solicitation, the Court of Appeals reached a different conclusion with respect to the ban on leafleting inside the air terminals. Relying upon Justice Kennedy's characterization of solicitation as a far more disruptive activity than leafleting, the Second Circuit held that the Port Authority's ban on leafleting in the air terminals was not constitutional (A 14-15).

Chief Judge Oakes dissented, stating that in his view the airport terminals were public fora. According to the dissent, *Kokinda* did not announce a new rule under which a site's public forum status was dependent upon the site's purpose (A 17-20). In Chief Judge Oakes' view, a number of factors, especially airport passageways' similarity to public streets, caused the airport terminals' passageways to have the status of public fora (A 21). Chief Judge Oakes agreed with the District Court that those characteristics of the airport terminals' passageways which result from their purpose of facilitating air travel do not warrant their classification as nonpublic fora (A 22-26). The dissenting opinion concluded that the District Court's judgment should be upheld because neither the ban on leafleting nor the ban on solicitation satisfied the requirements for regulation of expressive activity in a public forum (A 27-28).

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Plaintiffs argue that the Court of Appeals erred in holding that the airport terminals are not public fora, and that repetitive solicitation may be prohibited from within their interiors as a reasonable regulation that is viewpoint-neutral, that these determinations create a conflict among the circuits, and raise important issues of law. In response to the contentions of Plaintiffs, the Superintendent respectfully submits that the Court of Appeals correctly applied the public forum doctrine developed by this Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), in holding that the airport terminals are not public fora, and that, as a consequence, repetitive solicitation may be prohibited from within their interiors as a reasonable, viewpoint-neutral regulation.[10] The Superintendent, however, does not disagree that the decision of the Court of Appeals created a conflict among the circuits as to the public forum status of airport terminals, and, as a consequence, a conflict as to the standards to be applied to determine the constitutionality of restrictions on expressive activity in an airport terminal. Nor does the Superintendent disagree that such issues present important questions of law.

[10] The Superintendent contends in his Cross-Petition for a Writ of Certiorari that the failure of the Court of Appeals similarly to apply the reasonable, viewpoint-neutral test to the Port Authority's leafleting regulations is erroneous since it is inconsistent with this Court's public forum jurisprudence.

1. The Court of Appeals correctly held that the airport terminals are not public fora, and that repetitive solicitation may be prohibited from within their interiors.

The Court of Appeals correctly applied the principles of forum analysis in holding that the airport terminals are not public fora, and that, as a consequence, repetitive solicitation may be prohibited from within their interiors as a reasonable, viewpoint-neutral regulation.

Since the 1974 decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court has relied upon public forum analysis to decide cases in which persons have sought to use government property for expressive activity in violation of rules which restrict or prohibit the activity. *See, United States v. Kokinda*, ____ U.S. ____, 110 S.Ct. at 3115, 3119 (1990). In *Perry Education Ass'n v. Perry Local Educators' Ass'n, supra*, this Court for the first time set forth the public forum doctrine as a comprehensive analytical model for determining the extent to which a government agency must permit expressive activity in a publicly-owned facility. The model differentiated among a traditional public forum, a designated public forum, and a nonpublic forum. 460 U.S. at 45-46. This Court has consistently applied this model to resolve public forum cases. *See, e.g., United States v. Kokinda*, ____ U.S. ____, 110 S.Ct. 3115 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985).

Under the *Perry* model, a government may not constitutionally prohibit expressive activity in a traditional public forum or a designated public forum unless the prohibition is necessary to serve a compelling government interest.

Time, place and manner regulations may be enforced in a traditional public forum only if the regulations are reasonable, narrowly tailored and leave open alternative means of communication. In contrast, in a nonpublic forum, any reasonable restriction affecting expressive activity that preserves the forum for its "intended purposes" is fully constitutional as long as it does not discriminate against expressions of a particular viewpoint. 460 U.S. at 46, 49.

The Court of Appeals applied these principles to a setting which has not been the subject of forum analysis by this Court, airports,[11] and held that the airport terminals are not public fora.

Under the public forum principles enunciated by this Court, the Court of Appeals was correct in holding that the airport terminals are not public fora. A public forum is a "place[] which 'by long tradition or by government fiat ha[s] been devoted to assembly and debate.'" *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 802, *quoting Perry Education Ass'n v. Perry Local*

[11] Although this Court granted certiorari in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1982), to review, *inter alia*, the public forum status of an airport (*id.*, at 577 (White J., concurring, joined by the Chief Justice)), the case was resolved on the different issue of the facial validity of a Los Angeles International Airport regulation (*id.*, at 573-4).

The only case decided by this Court concerning the public forum status of any transportation facility was *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, this Court held that the public transit system of Shaker Heights, Ohio, was *not* a public forum, and upheld the city's prohibition of political advertising even though that policy discriminated among advertisers based on the content of their speech. *Id.*, at 301-302.

Educators' Ass'n, 460 U.S. at 45.[12] The Port Authority airport terminals purpose is *not* "public assembly and debate." Rather, they have as their sole purpose the facilitation of air travel.

All airport functions and services are either directly or indirectly related to facilitating air travel[13] by effectuating the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft (A 4, 13, 14). The Port Authority airports' sole purpose of facilitating air travel is reflected in the airports' operations, financing, lack of integration with neighboring communities, captive

[12] This definition echoes the description of the traditional public fora of streets and parks set forth in an oft-quoted passage by Justice Roberts in *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

The only public places specifically identified by this Court as traditional public fora are streets, sidewalks, and parks. *See, Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 802; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 813-14 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45. A college campus has been described as possessing "many of the characteristics of a traditional public forum", *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 803, *citing Widmar v. Vincent*, 454 U.S. 263 (1981), because it serves as a "marketplace of ideas." *Widmar v. Vincent*, 454 U.S. at 267 n.5 (citations omitted).

[13] Indirect aids to air travel at airports include refreshment stands, restaurants and retail shops, which are provided by airport operators for the comfort and convenience of air travelers.

audiences, and special congestion and security problems (A 4, 13, 14, 43-47). Thus, the air terminals do not share the public forum characteristics of being "a necessary conduit of a locality's citizens" or a place where people can "enjoy the open air of the company of friends and neighbors in a relaxed environment". *United States v. Kokinda*, 110 S.Ct. at 3120, *quoting Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981).[14]

In reversing the District Court, the Court of Appeals rejected the notion that airport terminals should be classified as public fora based on the mere fact that access to airport terminals is not restricted. As stated by this Court in reversing a determination that a facility was a public forum,

> "The Court of Appeals was mistaken...in thinking that...whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment. Such a principle...has never existed, and does not exist now." *Greer v. Spock*, 424 U.S. 824, 826 (1976); *see also, United States v. Kokinda*, 110 S.Ct. at 3120; *United States v. Grace*, 461 U.S. at 177.

In sum, the Court of Appeals correctly held that the Port Authority airport passenger terminals are nonpublic fora because their sole function is the facilitation of air travel — not communication.

Since the Court of Appeals was correct that the air terminals are not public fora, it follows that the Court of Appeals was correct in holding that the prohibition of solicitation within the air terminals is valid.

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[14] Hereinafter, "ISKCON" in citations will refer to "International Society for Krishna Consciousness, Inc." and similarly named parties.

A restriction on expressive activity in a nonpublic forum, such as the Port Authority's restriction on solicitation, is valid if it is viewpoint-neutral and reasonable in light of the purpose of the forum. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 806. The Port Authority restriction on solicitation easily satisfies these two criteria.

First, the Port Authority restriction on solicitation satisfies the threshold requirement that it be viewpoint-neutral. Indeed, the restriction is not only viewpoint-neutral, but is also content-neutral because all solicitation, whatever the religious, political or social content, is treated identically. *United States v. Kokinda*, 110 S.Ct. at 3124; *Clark v. Community for Creative Non-Violence*, 468 U.S. at 295; *Heffron v. ISKCON*, 452 U.S. at 649.

Second, the Port Authority restriction on solicitation satisfies the requirement that the restriction be reasonable in light of the purpose served by the forum. *United States v. Kokinda*, 110 S.Ct. at 3121; *Cornelius v. NAACP Legal Defense and Educational Fund Inc.*, 473 U.S. at 806. As recognized by both the District Court and the Court of Appeals, the purpose of the Port Authority airports is the facilitation of air travel (A 5, 13, 14, 43, 47).[15] Thus, a prohibition on solicitation in the airport terminals is valid for this reason alone, since, as this Court stated in *Perry*:

> "[W]hen government property is not dedicated to open communication the government may — *without further justification* — restrict use to those who participate in the forum's official

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[15] Although the District Court did not find that the purpose of the airports rendered the air terminals to be nonpublic fora, the District Court did not reject the contention that air travel *is* the purpose of the airports (A 47).

business." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 53 (emphasis added, footnote omitted).

Furthermore, it is reasonable for the Port Authority to impose the restriction at issue in furtherance of its legitimate interests in controlling the problems resulting from the solicitation of money at one of "society's chokepoints" (A 14). Solicitation is a form of behavior that has an especially disruptive effect on pedestrian traffic. *United States v. Kokinda*, 110 S.Ct. at 3123; *Heffron v. ISKCON*, 452 U.S. at 653. And, as held by the Court of Appeals, the problem of congestion is especially acute at the Port Authority airports (A 14).

Thus, the Court of Appeals correctly held that the Port Authority's prohibition on solicitation was a valid means of addressing the Port Authority's interest in controlling pedestrian congestion. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 808 ("The . . . decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." (emphasis in original)).

2. The decision of the Court of Appeals has created a conflict among the circuits.

The Superintendent does not dispute the contention of Plaintiffs that the decision of the Court of Appeals has created a conflict among the circuits as to the public forum status of airports, and, as a consequence, as to the standard to be applied to determine the constitutionality of restrictions upon expressive activity in airport terminals. However, as set forth above, the Superintendent respectfully submits that only the decision of the Second Circuit is consistent with forum analysis as enunciated by this Court.

To the extent that the other decisions applied forum analysis at all, they relied on factors which this Court has held are not determinative of public forum status, such as public ownership or public access. *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), and *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973).[16]

3. The decision of the Court of Appeals presents issues of national importance.

The Superintendent also does not disagree with the Plaintiffs' contention that the decision of the Court of Appeals involves important issues of law. The issue of the extent to which airport operators may constitutionally exercise control over expressive activity in their airports continues to be of national importance. Airports are very specialized, complex facilities that play a vital role in providing transportation to the nation. Since the decision below addresses the ability of airport operators to adopt and enforce rules for the safe, efficient and effective management of the nation's airports, the decision below involves legal issues of national importance.

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[16] Other circuit court decisions holding airports to be public fora have not set forth a rationale for using that classification, *see*, *ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979), or merely rely on prior decisions so holding. *See*, *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 794 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981); *ISKCON v. Rochford*, 585 F.2d 263, 267 (7th Cir. 1978).

The proliferation and persistence of litigation concerning the ability of an airport operator to restrict or prohibit leafleting, solicitation and other expressive activity in air terminals reflects the continuing desire of airport operators to exercise their legitimate authority over airports with respect to expressive activity as part of their efforts to provide safe, convenient and efficient facilities to air travelers. Both this brief and the Petition For A Writ Of Certiorari set forth the great number of reported decisions concerning the efforts of airport operators to regulate such behavior in airport terminals in the exercise of their common obligation to facilitate air travel.

Significantly, this Court previously acknowledged the importance of the issue of the extent to which airport operators can control expressive activity when it granted a writ of certiorari in *Board of Airport Commissioners v. Jews for Jesus, Inc., supra*. Although the *Jews for Jesus* case was resolved on the different issue of the facial validity of a Los Angeles International Airport regulation (482 U.S. at 573-4),[17] the issues upon which certiorari was granted

[17] The Los Angeles International Airport regulation at issue in *Jews for Jesus* provided, *inter alia*, that the Central Terminal Area of the airport "is not open for First Amendment activities by any individual and/or entity". *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 570 (1982). This regulation was held to be invalid irrespective of the public forum status of the airport because it was so broad as to prohibit *all* protected expression, including activity that would have no potential adverse effect on congestion or airport functions, such as reading. *Id.*, at 574-75.

The Los Angeles regulation is totally dissimilar to the Port Authority regulations at issue herein. Unlike the Los Angeles provision, the regulations at bar are narrowly drawn and are specifically directed at activities that have direct impact upon congestion, and thus, upon airport operations.

were the public forum status of the airport and the effect of that status on the ability of the airport operator to control expressive activity in the airport. *Id.*, at 577 (White J., concurring, joined by the Chief Justice); 55 U.S.L.W. 3197 (1986)(questions raised on petition).[18]

[18] "I join the Court's opinion but suggest that it should not be taken as indicating that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum. That issue was one of the questions on which we granted certiorari. . . ." 482 U.S. at 577 (1982)(White J., concurring, joined by the Chief Justice).

CONCLUSION

The Court of Appeals correctly held that the Port Authority airport terminals are not public fora, and, therefore, repetitive solicitation may be prohibited from within their interiors. The decision of the Court of Appeals created a conflict among the circuits as to the public forum status of airport terminals, and, as a consequence, a conflict as to the standards to be applied to determine the constitutionality of restrictions placed upon expressive activity in an airport terminal. Finally, the decision below addressed issues of national importance.

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